THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT GULU

[INTERNATIONAL CRIMES DIVISION]

HCT-00-ICD-SC-02 OF 2010

UGANDA …… PROSECUTOR

VERSUS

KWOYELO THOMAS alias LATONI ……..…… ACCUSED

BEFORE: **1. HON. MR. JUSTICE MICHAEL ELUBU (PRESIDING JUDGE)**
2. HON. MR. JUSTICE DUNCAN GASWAGA
3. HON. MR. JUSTICE STEPHEN MUBIRU
4. HON. JUSTICE DR. BASHAIJA K. ANDREW
(ALTERNATE JUDGE)

REGISTRAR: **HW JULIET HARTY HATANGA**

REPRESENTATION:

PROSECUTION: **1. GEORGE WILLIAM BYANSI D/DPP**
2. CHARLES RICHARD KAAMULI A/DPP
3. AKELLO FLORENCE OWINJI A/DPP
4. LILLIAN OMARA ALUM CSA

DEFENCE: **1. CHARLES DALTON OPWONYA**

2. CALEB ALAKA

3. EVANS OCHIENG

4. GEOFFREY BORIS ANYURU

VICTIMS: **1. MARY MAGDALANE AMOOTI**

2. HENRY KILAMA KOMAKECH

ASSESSORS: **1. ODONGKARA FRANKLINE**

2. AJOK NIGHTY

3. OCEN DANIEL

TRANSLATORS: **1. MR. ROBERT ADONGAKURU ROBERT**

2. MR. OTTO DAVID LABEJA

3. MR. OCAN ROBERT

COURT CLERK: **1. MR. KITANDWE PAUL**

RULING ON A NO CASE ANSWER

1. **Introduction**

2. Kwoyelo Thomas alias Latoni (hereinafter referred to as 'the accused') is indicted in 93 Counts, which fall in three broad categories: **(i) Crimes against humanity under customary international law (CIL); (ii) War Crimes committed in violation of Article 3 common to the Geneva Conventions; and (iii) other serious crimes under the Uganda Penal Code Act, Cap 120.**

3. It is alleged that the crimes charged in this indictment were committed in the context of a non-international armed conflict that occurred in Northern Uganda between the Lord's Resistance Army (hereafter referred to as 'LRA') together with associated local armed units, and the Armed Forces of the Republic of Uganda, between the years 1987 and 2005. It is also alleged that the intensity of those armed hostilities exceeded internal disturbances and tensions, such as riots and isolated and sporadic acts of violence.

4. The prosecution alleges that in carrying out the protracted armed violence, the LRA had well-structured armed forces. That the structure was under the overall leadership of Joseph Kony, and had a sufficient degree of organization that operated in an organized, hierarchical system of power with headquarters, divisions, brigades, battalions and companies, and that each unit had a commander assigned to it. That Joseph Kony, the commander-in-chief of the LRA, would generally communicate orders to other leaders who passed them to the brigade commanders, who then communicated them to the battalion commanders who in turn passed them on to their subordinates. That the LRA thus had the ability to plan and execute sustained military operations for a long period of time.

5. Further, it is alleged that in the LRA, subordinates followed the orders of their superiors almost automatically. The LRA fighters, conditioned by, and under threats of physical punishment, obeyed superiors and followed orders. That the LRA maintained a violent disciplinary system that guaranteed adherence to orders and rules. That the LRA was composed of a sufficient number of fungible individuals capable of replacement to guarantee that the orders of superiors were carried out if not by one subordinate, then by

another. The prosecution alleges that the accused was aware of these fundamental features of the LRA, as an organized and hierarchical system of power.

6. The prosecution further alleges that between 1987 and 2005, the accused was at all material times a member of the LRA, an organized armed faction that engaged in fighting the Government of the Republic of Uganda. That he held a number of command positions, and that due to his participation in numerous LRA operations, the accused was always in the know of the factual circumstances that culminated into the existence of this non-international armed conflict. That as such, a nexus existed between the armed conflict and the acts of the accused, which amount to **violations of Article 3 common to the Geneva Conventions**, and other **serious violations of International Humanitarian Law** and **the Penal Code Act**.

7. That for instance, between 1992 and 2005, the accused was a military commander in the LRA and held several positions including commander of Operations, Director of Military Intelligence and In-charge of all Sick Bays. That most of the time during his operations, the accused was based in Kilak hills located in the present day Amuru District. That his areas of operation covered the whole of Kilak County and in these areas he was a subordinate only to the overall leader of the LRA, Joseph Kony. The prosecution contends that as such, for that period, the accused had effective command and control, or authority and control, over his subordinates. That he mobilized his authority and power in the LRA to secure compliance with his orders and he carried out and caused his subordinates to carry out the conduct which amounted to the crimes stated in the indictment.

8. That his positon allowed the accused to exert control over the crimes charged as well as to prevent or repress any conduct by his subordinates of which he disapproved. That his subordinates complied with his orders as he had the power, inter-alia, to issue or give orders. That he could also ensure compliance with the orders issued, to order forces or units under his command, whether under his immediate command or at a lower level, to engage in hostilities. That he could discipline any subordinate, and had the authority to send forces to the site of hostilities and to withdraw them at any time. That despite the effective control

he held over his subordinates at the relevant time, he culpably failed to adopt necessary and reasonable measures to prevent or punish their crimes.

9. The prosecution asserts that the LRA leadership including the accused shared a common plan, purpose or design which was to take any action necessary to gain and exercise political power and control over the territory of Uganda, in particular Northern Uganda. That the modus operandi of the LRA included among others abduction, destruction of property and killings in order to prevent or minimize resistance to their activities and to use members of the population to provide support to the LRA. That between 1992 and 2005 the accused and his subordinates carried out several attacks in Kilak County formerly of Gulu District, now the present day Amuru District. That all the attacks which took place in Kilak County, now the subject of these charges in the indictment, were either carried out by the accused, under his command, or by his subordinates with his full knowledge and authority. The offences or the conduct alleged herein were committed within the territory of the Republic of Uganda.

10. The prosecution contends that from 1987 to 2005, the overall objective of the LRA was to overthrow the Government of Uganda through armed rebellion and to procure resources to pursue their criminal activities. That to achieve these objectives, the LRA adopted a number of policies that were implemented throughout the organization, such as launching attacks on civilians, including those living in protected internally displaced persons' camps (IDP camps). That male abductees were to be conscripted into their fighting ranks, and female abductees to serve primarily as domestic servants, sex slaves and forced exclusive conjugal partners. That the conduct and acts that form the basis for the charges in this indictment were committed between 1992 and 2005, as part of a widespread or systematic attacks directed against the civilian population of Northern Uganda. All acts and the conduct imputed to the accused were sufficiently connected to those attacks so as to fulfil the requirement of nexus between the acts of the accused and the attacks.

11. The defence

12. For their part, joint counsel for the defence submitted that the prosecution has not established *a prima facie* case in all the three categories of crimes charged in the indictment to warrant the accused person to be called to his defence.

13. On the 14 counts of crimes as violations of Article 3 common to **the Geneva Conventions under Customary International Law**, counsel argued that in all instances, there was insufficient evidence to establish a link or 'nexus' between the accused and the acts attributed to him. Further, that he never knew of, or ordered the alleged attacks.

14. That the prosecution failed to prove the essentials ingredients of the offences in all those counts under that particular category of the indictment.

15. Regarding the 59 Counts of other serious crimes under the **Penal Code Act,** counsel for the defence submitted that the essential ingredients of the offences were also not sufficiently established. In particular, that the prosecution failed to prove the essential ingredient of the accused's participation in the alleged crimes. That the accused was never properly identified by the witnesses and in addition, that the evidence of the prosecution witnesses was so contradictory; which rendered it practically impossible to be relied on to prove any of the ingredients of the offences charged in that category. That some of the evidence bearing on the offences was so weak given that some of the witnesses could not recall what exactly transpired since it was almost 18 years after the event that they recorded statements.

16. As regards the 20 Counts in the category of offences under **Customary International Law (CIL)** in the indictment, the defence raised the issue pertaining to the principle of legality and a fair trial under Article 28 (12) of **the Constitution of the Republic of Uganda, 1995**. The main thrust of their argument is that crimes against humanity have been codified by Uganda and defined under Section 8 of **the International Criminal Court Act No. 11 of 2010**. That by the time the alleged offences were committed, the said Act had not been enacted. That since Act No. 11 of 2010 does not have specific provisions for its

retrospective application, the alleged crimes against humanity allegedly committed before its passage cannot be sustained against the accused given the principle against retrospectivity of legislations. Counsel submitted that on all the counts, the accused be found to have no case to answer and he should be acquitted.

17. The finding of a case / no case to answer.

a. The procedural requirements.

18. Regulation 8 (1) of **The High Court (International Crimes Division) Practice Directions, 2011,** requires the application to the instant case, of the rules of procedure and evidence applicable to criminal trials in Uganda. Section 73 of **The Trial on Indictments Act** provides that when the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no sufficient evidence that the accused committed the offence, shall, after hearing the advocates for the prosecution and for the defence, record a finding of not guilty (see **Wibiro alias Musa v. R [1960] E.A. 184** and **Kadiri Kyanju and others v. Uganda [1974] HCB 215**). However, if it considers that there is sufficient evidence that the accused person committed the offence, it is required to call on the accused person to enter his defence and inform the accused person of his rights in doing so.

a. The evidential requirements.

19. A *prima facie* case is established when the evidence adduced is such that a reasonable tribunal, properly directing its mind to the law and evidence, would convict if no evidence or explanation was set up by the defence (see **Ramanlal Trambaklal Bhatt v. R. [1957] EA 332**). The evidence adduced at this stage, should be sufficient to require the accused to offer an explanation, lest he runs the risk of being convicted. Therefore, a *prima facie* case cannot be established by a mere scintilla of evidence or by any amount of worthless, discredited prosecution evidence. The prosecution at this stage is not required to have

proved the case beyond reasonable doubt, since such a determination can only be made after hearing both the prosecution and the defence.

20. There are mainly two considerations justifying a finding that there is no *prima facie* case made out as stated in the Practice Note of Lord Parker which was published and reported in **[1962] ALL E.R. 448** and also applied in **Uganda v. Alfred Ateu [1974] HCB 179,** as follows:

    a. When there has been no evidence to prove an essential ingredient in the alleged offence, or
    b. When the evidence adduced by prosecution has been so discredited as a result of cross examination, or is manifestly unreliable that no reasonable court could safely convict on it.

21. The preliminary objections.

22. As part of their submissions of a no-case-to-answer, counsel for the accused contended that the indictment is bad in law in respect of those counts preferred as constituting conduct in violation of Article 3 common to **The Geneva Conventions**, as well as those constituting crimes against humanity in violation of **Customary International Law**.

    a. The contextual nature of the armed conflict.

23. All four Geneva Conventions although regulating mostly inter-state armed conflicts, in their Common Article 3 extend general coverage to armed conflicts "not of an international character," occurring within the territory of a single state and in which the armed forces of no other state are engaged against the central government. On 13th March, 1991, Uganda acceded to the **Additional Protocol II to the Geneva Conventions**, which defines such conflicts as those which "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under

responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

24. However, the Courts have held that this territorial element is not necessary (see **ICTY, DuŠko Tadic Case**, **("Prijedor"),** Judgment of 7 May 1997, **Case No. IT-94-1- T**, pp. 239-240, para. 654; ICTY, **KupreŠki et al Case ("LaŠva Valley"),** Judgment of 14 January 2000, Case No. **IT-95-16-T**, p. 220, para. 552; and ICTY, **Tihomir BlaŠki Case ("LaŠva Valley"),** Judgment of 3 March 2000, **Case No. IT-95-14-T**, p. 69, para. 205). It is sufficient that forces, which although not those of the legitimate government, have *de facto* control over, or are able to move freely within, defined territory without international recognition or formal status of a *de jure* state.

25. The evidential factors for determining whether or not the armed conflict threshold test has been crossed in "not of an international character" situations, were decided in **Prosecutor v. Ramush Haradinaj et. al**., **case No. IT-04-84-T**, Judgement of 3 April 2008, paras. 49 and 60 and **The Prosecutor v. Dusko Tadić, IT-94-1-AR72**, Appeals Chamber, Decision, 2 October 1995, para. 70, to include:

26. "The number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones."

27. The defining characteristics therefore are: **(i)** sustained protracted armed violence taking place; **(ii)** conducted by dissident armed forces or other organised and well-disciplined forces or groups under a responsible command; and **(iii)** not involving the armed forces of any other State.

28. As regards the conflict at hand, considering the intensity of combat and the level of organisation of the Lord's Resistance Army, the calibre of weapons involved, the armed

conflict exceeded isolated and sporadic acts of violence, internal disturbances, riots or tensions. The nature of this conflict triggered the application of International Humanitarian Law.

29. A non-international armed conflict can be internationalised if a non-state armed group in fact acts under the control or on behalf of a foreign state. Although there is some evidence suggesting that on diverse occasions during the conflict, the Lord's Resistance Army received material support from the Republic of Sudan, there is no evidence to show that the said state attained such a degree of direction and control over the Lord's Resistance Army, as to be considered a military intervention by that state itself. For all intents and purposes, the armed conflict *prima facie* retained its non-international character.

a. The principle of legality in relation to crimes against humanity in contravention of customary international law.

30. In the category of violations of Article 3 common to **The Geneva Conventions** pursuant to customary international law, the accused stands indicted with the offences of: murder in Counts 2, 16, 21, 51 and 75; Pillaging in Counts 13 and 70; Cruel treatment in Counts 43, 48 and 72; Violence to life and person in Counts 87 and 92; Hostage taking in Counts 4 and 32; Outrages against personal dignity in Counts 44, 49, 73, 82, 86 and 91.

31. In the category of crimes against humanity in violation of customary international law, the accused stands indicted with the offences of: Murder in Counts 1, 15, 20, 50 and 74; Other Inhumane Acts in Counts 47 and 71; Torture in Counts 85 and 90; Rape in Counts 84 and 89; Enslavement in Count 81; and the offence of Imprisonment in Count 31. It is defence counsel's contention that those counts contravene the principle of legality in so far as they arise under **The International Criminal Court Act, No. 11 of 2010** which came into force on 25th June, 2010, long after the period during which the accused is alleged to have committed these offences.

32. The principle of legality is often referred to as the principle of "*nullum crimen sine lege*," which translates to "no crime without law." It states that no one can be punished unless there is a clear and definite law that provides for such punishment. According to Article 28 (7) of **The Constitution of the Republic of Uganda, 1995**, no person may be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a criminal offence. Similarly, except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law (see Article 28 [12]). The principle helps to ensure that the state cannot simply create new offences retroactively to punish individuals for conduct that was not previously prohibited.

33. The Courts in Uganda have tended to interpret those provisions as requiring prosecution on the basis of written (*lex scripta*) pre-existing criminal norms approved by the State (*lex praevia*), defining prohibited conduct and setting out the related sentence (*lex certa*), hence decisions such as those that require an offense to be defined and penalty for it prescribed (see **Salvatori Abuki v. Attorney General, S.C. Constitutional Petition No. 2 of 1997**). It is a constitutional imperative that a criminal offence is specifically defined and that it should be clear to all what its elements are. The said elements or ingredients should not be ambiguous or vague or too broad as to defy specific definition (see **Tumwesige Francis v. Attorney General, Constitutional Petition No. 36 of 2018**). Fair notice to the citizen comprises a formal aspect, an acquaintance with the actual text of a statute and a substantive aspect, an understanding that certain conduct is the subject of legal restrictions (see **Andrew Karamagi and another v. Attorney General, Constitutional Petition No. 5 of 2016**).

34. However, the concept of law comprises written as well as unwritten law. Although the majority of international crimes forming part of the law of armed conflict (*jus in bello*) reflected in war crimes have been established by international conventions, some have emerged from customary international law. While both Article 123 (2) of **The Constitution of the Republic of Uganda, 1995,** and Section 4 of **The Ratification of Treaties Act, Cap 204** necessitate ratification and domestication of treaty-based law

before its application in Uganda, this limitation does not apply to that part of customary international law that is not treaty-based. For example, the peremptory norms of international law, in so far as they cannot be derogated from or waived by states, have direct application domestically without the necessity of ratification.

35. According to Articles 53 and 64 of **The Vienna Convention on the Law of Treaties**, those treaties that are in conflict with general international law norms accepted and recognized by the international community of States as a whole, as norms from which no derogation is permitted, and which can be modified only by a subsequent norm of general international law having the same character, are void. Consequently, if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates. In the same vein, domestic law, including constitutional provisions of states, that are inconsistent with *jus cogens* norms, may not stand in the way of application of peremptory norms by the international community.

36. The concept of *jus cogens* is by definition, a set of rules from which states may not derogate. The concept recognises that there is a fundamental core group of international norms from which sovereigns may not derogate. *Jus cogens* violations, at a minimum, include: the prohibitions against genocide; slavery or slave trade; murder or disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; and systematic racial discrimination. *Jus cogens* norms are also referred to as peremptory norms, and they are peremptory because they prevail over and invalidate international agreements and other rules of international law in conflict with them. *Jus cogens* norms are binding on all states whether or not the states consent to them.

37. International law only criminalises serious acts rather than any violation of international human rights law as an international crime. *Jus cogens* norms protect universally observed, fundamental human rights and so do not rely on the consent of states. Therefore, Article 123 of **The Constitution of the Republic of Uganda, 1995** (which within the domestic legal order places the democratic will of the people above international law) requiring the ratification and domestication of treaties, does not apply to *Jus cogens* norms violations.

Similarly, **The Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War**, of 12 August 1949 specifically provides that:

> **Article 146** — Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts
>
> **Article 158** - The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.

38. To prove the existence of a customary rule, the two constituent elements of the custom must be established, namely, the existence of sufficiently consistent practices (material element), and the conviction of states that they are bound by this uncodified practice, as they are by a rule of positive law (mental element). "Violations of the laws and customs of war," are considered to form part of customary international law (see **Judicial Decisions: International Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946, 41 AM.J. IN'L L. 172 (1947)**. States have a duty to exercise jurisdiction over offences prohibited by peremptory norms of international law (*jus cogens*), when committed by their nationals or on a territory under their jurisdiction. It was held in the **Case of Almonacid-Arellano et al v. Chile, IACtHR,** Judgment of September 26, 2006, para 151 – 153 that

> "the State may not invoke the statute of limitations, the non-retroactivity of criminal law or the *ne bis in idem* principle to decline its duty to investigate and punish those responsible ... crimes against humanity are intolerable in the eyes of the international community and offend humanity as a whole ... crimes against humanity is a norm of General International Law (*jus cogens*), which is not created by said Convention, but it is acknowledged by it."

39. The concept of *jus cogens* reflected in Article 158 of **The Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War**, was indirectly recognised in Uganda by **The Geneva Conventions Act, Cap 363**, which it domesticated the convention. The Act rendered punishable in Uganda, violations of *jus cogens* norms, practices and usages recognised and established among civilized peoples, from the laws of humanity, and the dictates of public conscience, by practices which encourage, or condone: (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations or internationally recognised human rights, and the customs of war under customary international law. The principle of *nullum crimen* is not infringed where the conduct in question would universally be acknowledged as wrongful and there is doubt only in respect of whether it constitutes a crime under a particular system.

40. Moreover, the repression of serious violations of international humanitarian law is essential for ensuring respect for this branch of law. This is particularly in view of the gravity of certain violations, qualified as war crimes, which it is in the interest of the international community as a whole to punish. Although there has been some limited form of codification of international criminal law in the statutes of the various international criminal tribunals, for violations of *jus cogens* norms, such codification is in essence not legislation of such crime into existence, but rather a recognition of crime already existing as such in customary international law. They are a codification of rules of international humanitarian law that are declaratory of customary law applicable to international armed conflicts.

41. Such treaties do not set down norms of international law or legislate with respect to those norms. They simply empower the respective tribunals to apply existing customary international humanitarian law. A narrow interpretation of grave breaches limits the scope under which alleged perpetrators could be held criminally liable for violations of international humanitarian law, yet the object and purpose of international humanitarian law, is to protect civilians to the maximum extent possible. There is no doubt that crimes

against humanity form part of customary international law. They found expression in Article 6 (c) of **the Nuremberg Charter** of 8th August, 1945; Article II (I) (c) of **Law No. 10 of the Control Council for Germany** of 20th December, 1945 and Article 5 (c) of **the Tokyo Charter** of 26th April 1946, three major documents promulgated in the aftermath of World War II (see **Prosecutor v. Dusko Tadic aka "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995 para 76**). As a matter of customary international law, the term "crimes against humanity" includes a range of serious human rights abuses committed as part of a widespread or systematic attack by a government or organization against a civilian population, while war crimes are "serious violations of the customs of war." Both represent the determination of civilized man to value human life and dignity and to lessen suffering.

42. Therefore, objection to the prosecution of war crimes and Crimes against humanity as *jus cogens*, at any level by any jurisdiction is incompatible with the character of the norms. National justice must be the first bulwark against violations of humanitarian law. The fact that there is not a strong record of national investigation and prosecution of international crimes is not an obstacle for the formation and the identification of customary law. The principle of legality requires that prosecution and punishment be based upon clear provisions of international law at the time the crime was committed. The requirements of both specificity and non-ambiguity in domestic prosecutions are met by the jurisprudence of the international tribunals that is declaratory of customary international law, so long as those decisions do not criminalise conduct which, at the time it was committed, could reasonably have been regarded as legitimate. General principles of law derived from national laws, judicial decisions and the teachings of the most highly qualified publicists of the various nations,' are subsidiary sources.

43. No doubt, prohibitions against the non-retroactive application of criminal sanctions and against *ex post facto* criminal laws are fundamental principles of legality. However, the rules of international criminal law emanate from sources of international law (such as treaties, customary law, state practice, *opinio juri*s, the general principles of law as

recognized by civilized nations). The concept of penal sanctions was definitively incorporated into customary international criminal law after the Second World War, when the Nuremberg and Tokyo Tribunals were established. The penal sanctions contained in the treaties which set up the two tribunals were a reflection of the general principles of law as recognized by civilized nations at the time.

44. While according to Article 27 of **The Nuremberg Charter** (Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, of 8th August, 1945) and Article 3 (a) of **Law No. 10 of the Control Council for Germany (Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, of 20th December, 1945)**, the Tribunals had the power to impose upon an accused, on conviction, the death penalty or such other punishment as determined by them to be just. The international community has since removed capital punishment from the scale of sanctions, a significant development since the Nuremberg and Tokyo trials. The practice of the international tribunals as appropriate, has been to have recourse to the practice regarding prison sentences in preceding International Criminal Tribunals and the relevant national courts. Consequently, by virtue of the general principles of law as recognized by civilized nations, the harshest sentence that can be handed down under customary international criminal law for a person convicted of crimes against humanity, is a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

45. Since customary international law has to be assessed as of the date of commission of the offences, the fact that **The International Criminal Court Act, No. 11 of 2010** was enacted subsequent to the material dates specified in the indictment, limits its weight and usefulness as a source of customary international law at the time the crimes were committed. The counts by which the accused stands indicted with offences that constitute crimes against humanity are understandably not stated to be in contravention of **The International Criminal Court Act, 11 of 2010,** but rather under customary international law. That statute was enacted to give effect to **The Rome Statute of the International Criminal Court**; to provide for offences under the law of Uganda corresponding to offences within the

jurisdiction of that court, and for connected matters. While codification ordinarily indicates a legislative intent that the statute should totally supersede and replace the common law dealing with the subject matter, **The International Criminal Court Act, No. 11 of 2010** was never intended to be a codification of customary international criminal law applicable in Uganda.

46. Even if **The International Criminal Court Act** had been intended to be revisionary, it is trite that codifications generally leave untouched common law in areas falling outside the scope of the statute. In any event, parallel with the movement for the codification of international criminal law, custom and treaties may co-exist on the same subject matter. The two sources do not supplant each other and have separate methods of application. Additionally, the scope and definition of international crimes in national law might not be the same as that under customary international law. The definitions of crimes in statutes and international instruments may be broader or narrower than that in custom. In particular, this **Act No 11 of 2010** is not declared to be an exhaustive codification of existing customary international law regarding war crimes and of crimes against humanity. In the circumstances, it would be a mistake to regard **The International Criminal Court Act, No. 11 of 2010** as displacing the existing prior sources of customary international law. Customary international law continues to govern offences which are not stipulated by the Act.

47. As has been demonstrated above, the principle of *nullum crimen sine leg*e is not violated by incorporating into the indictment, those prohibitory norms which are beyond doubt, part of customary international criminal law, since customary international criminal law, regarding war crimes and crimes against humanity, existed long before its early partial codification during the Nuremberg and Tokyo trials, and has since the conclusion of those trials evolved to establish the harshest sentence for such violations as a term of life imprisonment.

48. For the above discourse, the objection raised by counsel for the defence is accordingly overruled.

49. Counts in respect of which the evidence is insufficient or lacking.

a. War Crimes committed in violation of Article 3 common to *The Geneva Conventions*.

50. In Counts 4 and 32 of the indictment, the accused is charged with the offence of Hostage Taking as a violation of Article 3 (1) (b) Common to **The Geneva Conventions** pursuant to customary international law. For there to be a case to answer established against the accused, the prosecution must make out a *prima facie* case on each of the following essential ingredients: **(i)** unlawful deprivation of freedom of a victim; **(ii)** wantonly and sometimes under threat of death; **(iii)** taking no active part in the hostilities; **(iv)** to obtain some advantage or obtain some undertaking from another; and **(v)** the participation of the alleged perpetrator.

51. As regards Count 4, the prosecution adduced the evidence of C4, C5, C6, C7, C19, C20, Odong Menya, Okot Charles, Ojok Patrick and Ogena Simon, all of Abera village, Parubanga Parish in a bid to sustain the above elements. Save for the fourth element, there was no evidence led to prove or show that the victims named herein above were taken hostage with the intention of obtaining some advantage or undertaking from a third party.

52. Similarly, under Count 32, the prosecution adduced the evidence of Rodento Ochola, Masimo Oboma, Oyet Samuel, Ocii Doctor, Sabino Obwoli Oola, Oryem Quirino, Okot Antonio, Okoya Maurensio and Onai, to establish all the elements of this offence. Save for the fourth element of obtaining some advantage or undertaking from a third party, this count should also fail.

53. We therefore find that a *prima facie* case has not been established in respect of the above two Counts.

54. Other serious offences under The Penal Code Act.

55. In Counts 18, 19, 25, 27, 28, 29, 30 and 59 of the indictment, the accused is charged with the offence of Murder. For a *prima facie* case to be established for the offence of murder, the prosecution must the following essential ingredients: **(i)** death of a human being occurred; **(ii)** the death was caused by some unlawful act; **(iii)** that the unlawful act was actuated by malice aforethought; **(iv)** and that the accused participated.

56. As regards Counts 18 and 19, the victims were Okeny Wilson and Ojok Martin, respectively. The evidence adduced by the prosecution shows that some time in the month of February, 1996, the two had been abducted from around Paibi-Atiak road, Parubanga parish in the presence of PW5 (E1's brother). They were never seen again. Apart from the evidence of PW5, no other evidence was called by the prosecution. The other three elements do not have any evidence to sustain them.

57. The accused is further charged with the murder of Obalo Bicensio in Count 25; Arop Jerimiah in Count 27; Obol Vincent in Count 28; Arop Daniel in Count 29; and one Charles in Count 30. This is alleged to have taken place during the month of February 1996. All these victims were from Abera village, Parubanga parish, Pabbo sub-county. In addition, the accused was charged in Count 59 with the murder of Oyela Betty of Oboo parish, Lamogi sub-county which occurred on the 16th of May, 2004. It should be noted that in all these counts, apart from the prosecution naming the victims and their respective places of abode in the indictment, no other evidence was adduced to establish the offences. The Court finds that the prosecution has not established a *prima facie* case in respect of these counts.

58. In Counts 7, 9 and 38 of the indictment, the accused is charged with the offence of Kidnap with intent to murder. For there to be a case to answer made out against the accused, the prosecution must establish a *prima facie* case on each of the following essential ingredients: **(i)** unlawful taking or abduction of the victim; **(ii)** by the use of force, fraud, or coercion;

(iii) with the intention of killing/exposure of the victim to death; and **(iv)** the accused participated.

59. It was alleged in Counts 7, 9 and 38, that Menya Odong, Ongom s/o Omoyo and Oryem Quirino, respectively, were the victims who had been kidnaped with intent to murder. All the said victims were from Abera village, Parubanga parish. The court has not found any iota of evidence to prove any of the elements of the offence in respect of these counts. The prosecution has not established a *prima facie* case in respect of these three counts.

60. In Count 83 of the indictment, the accused is charged with the offence of Procuration of unlawful carnal knowledge. For there to be a case to answer made out against the accused, the prosecution must establish the following essential ingredients: **(i)** the victim is under the age of 21 years; **(ii)** persuasion or invitation of the victim **(iii)** for having carnal knowledge, perpetration **(iv)** by the accused or other men. It is alleged that the victim was **TR** (a protected witness) of Perecu village, Parubanga parish. The prosecution led the evidence of PW 25 (the victim) to prove the first, third and fourth essential elements of the offence. However, the second essential element of persuasion or invitation is lacking, as there was no evidence led to establish it. No prima facie case in respect of this count has been established.

61. The court also noted from the indictment that Count **46** was a repetition of Count **45** which has already been dealt with. For avoidance of doubt, no finding has been made in respect of Count **46**.

62. Counts in respect of which the prosecution has established a *prima facie* case.

a. War Crimes committed in violation of Article 3 common to The Geneva Conventions.

63. In Counts 2, 16, 21, 51 and 75, the accused was indicted with the offence of Murder as a violation of Article 3 (1) (a) Common to **The Geneva Conventions** pursuant to customary

International law. The essential elements for this offence are: **(i)** an armed conflict not of an international character; **(ii)** there were acts or omissions causing death; **(iii)** that the acts were committed wilfully; **(iv)** on victims who were taking no active part in the hostilities; **(v)** that there was a nexus between the acts or omissions of the perpetrator and the armed conflict.

64. After applying the above test to the evidence on record, the court finds that there is a case to answer in respect of Counts 2, 16, 51 and 75. With regard to Count 21, the evidence adduced supports a case to answer only in respect to the following victims: Aceng Christine, Loum Acupale, Ngwe Julio, Gwok Paulo.

65. In Counts 13 and 70, the accused was charged with the offence of Pillaging as a violation of Article 3 (1) (a) Common to **The Geneva Conventions** pursuant to customary International law. The essential elements for the offence are: **(i)** that the perpetrator appropriated certain property; **(ii)** he did so without the consent of the owner; **(iii)** it was done in the context of, and associated with, an armed conflict not of an international character; **(iv)** the appropriation was not justified by military necessity; and **(v)** it involved grave consequences for the victims. Having carefully applied the test laid out above, the Court finds that there is a case to answer in respect of both counts.

66. In Counts 43, 48 and 72, the accused was charged with the offence of Cruel Treatment as a violation of Article 3 (1) (a) Common to **The Geneva Conventions** pursuant to customary International law. The following are the essential elements of this offence: **(i)** that there was an intentional act or omission; **(ii)** which caused serious mental or physical suffering; **(iii)** that the victim was not involved in the armed conflict; **(iv)** the perpetrator partipated. The court finds that a *prima facie* case case has been established in respect of all three counts.

67. In Counts 87 and 92, the accused was indicted with the offence of Violence to life and person, as a violation of Article 3 (1) (a) Common to **The Geneva Conventions** pursuant to customary international law. The essential elements for the offence violence to life under customary international law are that: **(i)** there was an intentional act or omission such as

murder of all kinds, mutilation, cruel treatment, rape and torture; **(ii)** affecting the physical or mental well-being of the victim; **(iii)** who was not taking an active part in the hostilities; **(iv)** by the perpetrator. The court has found that the accused has a case to answer in respect of both counts.

68. In Counts 44, 49, 73, 82, 86 and 91, the accused was charged with the offence of Outrages against personal dignity as a violation of Article 3 (1) (a) Common to The Geneva Conventions pursuant to customary International law. The essential elements to establish this offence are that: **(i)** there was a serious humiliation, degradation or a serious attack on the human dignity of the victim; **(ii)** with the knowledge of the possibility of that effect; and **(iii)** by the pepetrator. The court has found that there is a case to answer in respect of all the six counts.

69. Crimes against humanity under customary international law.

70. In Counts 1, 15, 20, 50 and 74, the accused is charged with the offence of Murder as a crime against humanity pursuant to customary international law. The essential elements of the offence are that: **(i)** the perpetrator killed one or more persons; **(ii)** as part of a widespread or systematic attack directed against a civilian population; **(iii)** the perpetrator knew or had knowledge or intended that it was part of a widespread attack against the civilian population. After applying the tests above to the evidence adduced in this part, the court finds that there is a case to answer in respect of Counts 1, 15, 50 and 74. As for Count 20, the evidence adduced can only support a case to answer in respect to the following victims: Aceng Christine, Loum Acupale, Ngwe Julio and Gwok Paulo.

71. In Counts 42, 47 and 71, the accused was charged with the offence of other inhumane acts as a crime against humanity pursuant to customary international law. The essential elements required to establish this offence are that: **(i)** great suffering, or serious injury was inflicted by an inhumane act; **(ii)** it was done under the control of the perpetrator; **(iii)** as part of a widespread or systematic attack directed against a civilian population. The court

finds that there is sufficient evidence to establish a prima facie case in respect of all the counts.

72. In Counts 85 and 90, the accused was charged with the offence of Torture as a crime against humanity pursuant to customary international law. The essential elements of this offence are that: **(i)** the perpetrator inflicted severe physical or mental pain or suffering on someone under the control of the perpetrator; **(ii)** for any reason based on discrimination of any kind; **(iii)** it was not inherent or incidental to lawful sanctions; and **(iv)** it was part of a widespread or systematic attacks directed against a civilian population. The court finds that there is a case to answer in respect of both counts.

73. In Counts 84 and 89, the accused was charged with the offence of Rape as a crime against humanity pursuant to customary international law. The essential elements for this offence are that: **(i)** the perpetrator invaded any part of the body of a person resulting in penetration of any part of the body of the victim with a sexual organ, or with any object; **(ii)** that it was done by force, or by threat of force or coercion; **(iii)** it was part of a widespread or systematic attack directed against a civilian population; and **(iv)** that the perpetrator knew that it was part of a widespread or systematic attacks on the civilian population. This court finds that there is a case to answer on both counts.

74. In Count 81, the accused is charged with the offence of Enslavement as a crime against humanity pursuant to customary international law. The essential elements of this offence are that: **(i)** the perpetrator exercised the powers attached to the right of ownership over the victim; **(ii)** it was part of a widespread or systematic attack directed against a civilian population; and **(iii)** that the perpetrator knew that it was part of a widespread or systematic attacks on the civilian population. This court finds that there was a case to answer on both counts.

75. In Count 31, the accused is charged with the offence of Imprisonment as a crime against humanity pursuant to customary international law. The essential elements of this offence are that: **(i)** the perpetrator deprived the victim of physical liberty; **(ii)** in circumstances that

constituted a violation of fundamental rules of international law; **(iii)** it was part of a widespread or systematic attack directed against a civilian population; and **(iv)** that the perpetrator knew that it was part of a such a widespread or systematic attacks on the civilian population. This court finds that there was a case to answer on this count.

76. Other serious offences under The Penal Code Act.

77. In Counts 3, 17, 18, 19, 22, 23, 24, 25, 26, 27, 28, 29, 30, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 76, 77, 78, 79 and 80, the accused is charged with the offence of Murder c/s 188 and 189 of **The Penal Code Act**. The essential elements of this offence have been outlined above. Out of these 36 Counts, this court finds that a *prima facie* case has been established in respect of only 28 Counts namely 3, 17, 22, 23, 24, 26, 52, 53, 54, 55, 56, 57, 58, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 76, 77, 78, 79 and 80.

78. In Count 45, the accused is charged with the offence of Attempted Murder contrary to section 204 (a) of **The Penal Code Act**. The essential elements of the offence are: **(i)** a substantial or direct act done towards killing another person; **(ii)** with the intention of killing that person; and **(iii)** with the participation of the accused. This court finds that a prima facie case has been established in respect to this count.

79. In Counts 5, 6, 7, 8, 9, 10, 11, 12, 33, 34, 36, 37, 38, 39, 40 and 41, the accused is charged with the offence of Kidnap with Intent to Murder contrary to sections 243 (1) (a) of the **Penal Code Act**. The essential elements of this offence are that: **(i)** there was the unlawful taking of the victim; **(ii)** the taking was by the use of force, fraud, or coercion; **(iii)** with the intention of killing or exposing the victim to death; and **(iv)** that the accused participated. Out of the 16 Counts charged, the court finds a prima facie case has been estrablished in respect of 14 counts namely: Counts 5, 6, 8, 10, 11, 12, 33, 34, 36, 37, 39, 40 and 41.

80. In Count 14, the accused is charged with the offence of Aggravated Robbery contrary to sections 285 and 286 (2) of **The Penal Code Act**. The essential elements of the offence are: **(i)** theft of property belonging to another; **(ii)** with the use or threat to use violence;

(iii) use of a deadly weapon; and **(iv)** the accused participated. This court finds that a *prima facie* case has been established in respect to this count.

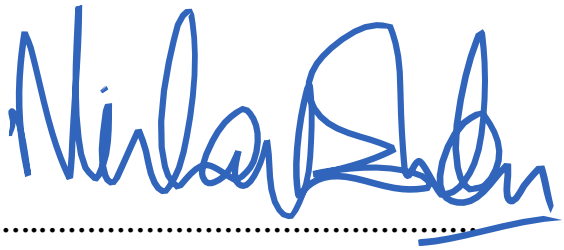
81. In Counts 88 and 93, the accused is charged with the offence of Rape contrary to Sections 123 and 124 of **The Penal Code Act**. The essential elements of the offence are that: **(i)** there is carnal knowledge of the victim; (ii) without the consent of the victim; and **(iii)** that the accused participated. This court finds that a *prima facie* case has been established in respect to both counts.

Final Orders

The Court hereby orders that:

a. In respect of Counts **4, 7, 9, 18, 19, 25, 27, 28, 29, 30, 32, 38, 59** and **83** the accused has no case to answer and he is hereby acquitted on these particular counts.
b. With the exception of Count **46** which is a repetition of Count **45** the accused has a case to answer in respect of the remaining 78 Counts. The Court orders that he shall be put to his defence on those Counts.

Delivered at Gulu on this 18th Day of December 2023



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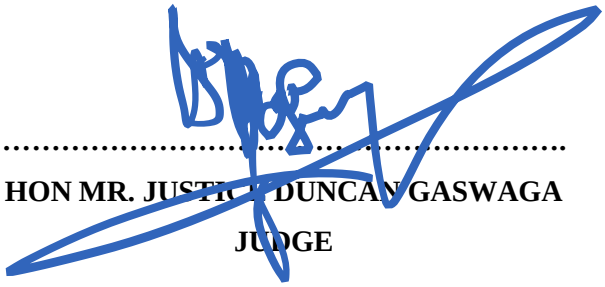
HON MR. JUSTICE MICHAEL ELUBU

JUDGE



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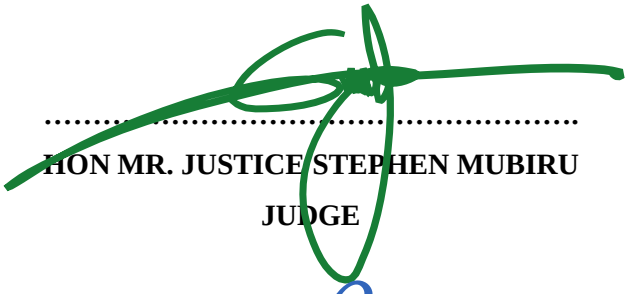
HON MR. JUSTICE DUNCAN GASWAGA

JUDGE



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HON MR. JUSTICE STEPHEN MUBIRU

JUDGE

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HON DR. JUSTICE BASHAIJA K. ANDREW

ALTERNATE JUDGE